No. 12,202

IN THE

# United States Court of Appeals

For the Ninth Circuit

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THOMAS J. HUGHES,

*Appellant,*

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

*Appellee.*

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## APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona

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### STATEMENT OF THE CASE

Plaintiff's statement of the case is unacceptable, because it is argumentative, in that it assumes as established facts highly controverted assertions that plaintiff, at all times in issue, was physically disabled from doing more than trivial tasks, and that his income was received from capital investments, and that he was totally and per-

manently disabled under the terms of the policy. His statement is not an impartial and analytical resumé of the ultimate facts: It is a synopsis of his argument. A more comprehensive and less controversial statement follows.

In June, 1923, plaintiff applied for, and received from defendant, a policy of life insurance which included provisions for payment to him of monthly income and for waiver of premiums in the event that he became, and for so long as he continued to be totally and permanently disabled as defined in the policy; i.e.:

> "* * * totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation. * * *."

The policy was rewritten and reissued upon plaintiff's application, in July, 1925, with modifications which are not material to this controversy.

In 1932, and again in 1935, plaintiff sustained injuries to his spine. Following the second injury, he applied for total and permanent disability benefits, and he received from defendant between July 15, 1935, and January 1, 1942, the monthly income payments and waiver of premiums. These benefits were discontinued by defendant on the ground that plaintiff was not totally and permanently disabled.

No disability benefits have been allowed since January, 1942. Plaintiff has paid all premiums since then under protest. Six years later, in January, 1948, he instituted this suit. The gist of his complaint is that, at all times

since February, 1935, he has been totally and permanently disabled by bodily injury and disease from performing any work for compensation, gain or profit and from following any gainful occupation whatever (R. 6).

The suit was filed in the Superior Court of Arizona, but it was removed by defendant for diversity of citizenship. At the close of the evidence submitted by plaintiff at the trial, the court, upon defendant's motion, directed a verdict and entered judgment for defendant. Plaintiff's motion for a new trial was denied, and plaintiff perfected this appeal.

Plaintiff was seventy-two years old when the case was tried (R. 155). According to his physician, he was an active man, mentally alert and organically sound (R. 100), but he was afflicted with chronic multiple hypertrophic arthritis which had its onset in 1935.

Plaintiff was born and reared on a Kansas farm, and, although he was educated for four years in normal schools to become a teacher, farming has been his principal lifetime occupation (R. 110, 111).

He has resided and operated a farm near Tempe, Arizona, continuously since before he contracted arthritis. He has kept the land under cultivation and has raised hay and grain. He has maintained a dairy herd and some calves, steers and other livestock on the place. During this period of time, his acreage has increased to 412 acres, his dairy herd has increased to 55 or 60 head of cows, and his calves and steers have increased to 75 head, and his farming operations produce more income than they did back in 1935 (R. 122 to 125; 133, 134, 137, 138, 145, 150, 207). (These activities will be discussed more extensively during the argument.)

His dairy operations have produced a monthly income from $800.00 to $1000.00 per month. He has leased 185 acres of farm land at rentals from $35.00 to $38.00 per acre per year. The annual income from these sources alone produces an annual income from $16,000.00 to $19,-000.00. He has also sold grain, hay and livestock from his farm, as to which no income figures were supplied (R. 124, 138, 140, 146; 148 to 151; 189).

Acting for and on behalf of a nonresident sister, he advertised and leased a 40-acre tract of land near Phoenix, Arizona, and arranged to have it prepared to raise barley, and to have the barley planted, harvested and stored (R. 143 to 145; 166, 167).

He personally keeps his own books, and makes his own entries therein of sales, purchases, expenses, etc. (R. 155 to 158), and he pays all bills when due in their ordinary course, pursuant to statements which are brought to him for checking (R. 204).

He has borrowed money, signed loan applications, notes and mortgages, and he has retired the debts represented thereby (R. 138, 163, 164, 167, 182, 183).

He served as the Administrator of a decedent's estate, and in such capacity asked for additional compensation for extraordinary services in such capacity (R. 184 to 188).

He has served as the president of a rural school district, and as Vice Chairman and Chairman of the Council of the Salt River Valley Water Users Association, continuously since before he contracted arthritis (R. 106, 107, 112, 113, 197). (These activities will be discussed more extensively during the argument.)

Other activities in which he has participated, either immediately prior to the discontinuance of disability benefits or during the period of time involved in this suit, include: Service as a member of a labor committee for the Salt River Valley Water Users Association, in 1941 and 1942; service as an accredited representative of such Association for a tax conference in Washington, D. C., in 1942 (R. 194, 198 to 200); occasional operation of his automobiles (R. 104); and two long automobile trips of one day duration each, when he went to Flagstaff, Arizona, in 1947, and to Santa Ana, California, in 1948 (R. 131, 132, 191).

## SUMMARY OF ARGUMENT

1. *There is no issue as to the interpretation of the policy,* because no ambiguity therein is presented. The test of total disability is not whether plaintiff can do all or even substantially all of the things he did when he was younger and before he developed arthritis, but is whether he can pursue, with reasonable continuity, his customary occupation or some other occupation for which he is qualified by education, station in life, age and physical and mental capacity.

2. *The cases discussed in plaintiff's brief are distinguishable,* in that an analysis thereof reveals that different fact situations and different issues arose therein than such as are presented here.

3. *The cases cited by defendant are persuasive,* because they deal with farm management and executive occupations and activities similar to the occupations and activities in which this plaintiff is engaging, and the issue of law were identical to such as are presented here.

4. *The theory of common care and prudence is not applicable here,* because it is a doctrine to be considered only when the insured actually abandons his occupation, or endeavors unsuccessfully to perform odd jobs or sporadic tasks, and when it appears that to work actually jeopardizes his life or his health. It is not applicable where, as here, the insured actually follows a gainful occupation, and it appears that the only effect thereof is to aggravate arthritic pain.

5. *The theory of income from capital investment is not applicable,* because the undisputed evidence established that plaintiff's income, during the entire six-year period involved in this action, has been derived exclusively from the same occupations which he followed before he developed arthritis, and that these are the occupations for which he is fitted by education, station in life, age and physical and mental capacity.

6. *There was no competent evidence advanced at the trial which would entitle plaintiff to demand or to receive total disability benefits under the policy,* and the trial court properly directed a verdict for defendant.

## ARGUMENT

### 1. There Is No Issue as to the Interpretation of the Policy.

Plaintiff's argument on his points numbered 12 to 20, inclusive (Br. 46 to 53), is surplusage.

It is not entirely clear what is meant by his contention that the policy is to be construed for him and against the defendant. Such might be the rule if an ambiguity were presented. Here there is no ambiguity, hence no need for construction. *Prudential Ins. Co. of America v. Wolfe,* (C.C.A. 8), 52 F.2d 537.

Of course, if plaintiff were to maintain that total disability and partial disability were the same, then his so-called "liberal rule of construction" would be illogical, because there is no occasion to import into this policy such an ambiguity nor to force from its plain words such an unusual and unnatural meaning. *Aronson v. Mutual Life Ins. Co. of New York,* 313 Ill. App. 35, 38 N.E. 2d 976.

Defendant does not maintain, as suggested on pages 46 to 49, of plaintiff's brief, that plaintiff was required to establish absolute lack of earning power or ability to work, or that he will be disabled throughout his lifetime, or that he was required to educate himself for nonmanual employment. Defendant does maintain that the question of total disability is a relative one, to be determined largely in the light of the capabilities and training of the insured, *Cleveland v. Sun Life Assur. Co. of Canada,* 13 W.2d 318, 125 P.2d 251, and that the test is not whether he can do all or even substantially all of the things which he did in following his occupations before he became afflicted with disease and was younger, but rather whether or not he could work, as stated in plaintiff's Specification of Error (Br. 12):

> "* * * with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity."

**2. The Cases Discussed in Plaintiff's Brief Are Distinguishable.**

Plaintiff has cited sixty-nine cases, but has discussed or quoted from nine of them only.

These nine cases, with the exception of *Prudential Ins. Co. v. Harris,* (Br. 52, 53), generally adhere to the test of

total disability stated hereinbefore. The excepted case, because of *stare decisis,* treats the policy as though it insured against disability in the insured's own occupation.

The case of *Anair v. Mutual Life Ins. Co. of N. Y.,* (Br. 41 to 43), gives recognition to the principle that each case must be decided upon its own facts, with no necessity for the court to review all cases cited. This case will be discussed in connection with the "capital investment" theory, *infra.*

The case of *Johnson v. Mutual Life Insurance Co.,* (Br. 48, 49), deals with the matter of permanency of illness and disability, which is not an issue here.

The following conclusions apply to the group of nine cases under consideration:

(1) None of these cases was decided by the Supreme Court of Arizona or by the Ninth Circuit Court of Appeals.

(2) In the *Harris* and *Anair* cases, *ante,* as well as in *Erreca v. Western States Life Ins. Co.,* (Br. 15, 16), *Mutual Life Ins. Co. v. Dowdle,* (Br. 30 to 32), *John Hancock Mutual Ins. Co. v. Magers,* (Br. 34), and *Raub v. Mutual Life Ins. Co. of N. Y.,* (Br. 35, 36), the courts were considering the propriety of submitting the cases to the jury, on appeals by the insurance companies from verdicts and judgments for the parties insured.

(3) In the *Erreca, Dowdle* and *Magers* cases, *ante,* as well as in *Leonard v. Pacific Mutual Life Ins. Co.,* (Br. 38, 39), each insured party was found to be wholly unable to *manage* his farm, and was also found to have *abandoned* management to others.

In the *Erreca* case, the insured was forced to abandon management and control of his farm to his son, and of

his dairy to his partner, because of his shortness of breath, rapid heart, and inability to stand on his feet for more than brief periods of time. The evidence established that he could not perform any essential supervisory function.

In the *Dowdle* case, the evidence tended to establish that the insured was physically unable to give detailed attention to the duties of farm management. Even so, the court acknowledged that the matter of total disability was a perplexing question.

In the *Magers* case, the insured was compelled by physical disability to employ a manager to operate his farms and the insured only visited some of his farms on three or four occasions per year. Before his disability, the insured had never employed a foreman, and had made up his own payroll, paid his men and marketed his farm products.

In the *Leonard* case, the insured was compelled to turn over the management of his farm to his brother.

(4) In the *Anair* and *Leonard* cases, *ante,* as well as in *Caldwell v. Volunteer State Life Ins. Co.,* (Br. 44 to 46), each insured party was found to be unable to manage his or her own business, and, due to mental disability, was precluded from following any gainful occupation, although it did appear in the *Caldwell* case that the insured, who had been adjudicated mentally incompetent and who had a court appointed guardian, held office as a court clerk and signed papers prepared and presented to him by a deputy.

(5) In the *Harris* case, *ante,* the insured had quit his job as a pipe fitter, because of physical inability to con-

tinue his line of work, and in the *Raub* case, *ante,* the court accepted as a proved fact that the insured was forced by physical disability to lead an entirely different manner of life, and could no longer do the things required of a farmer and dairyman.

### 3. The Cases Cited by Defendant Are Persuasive.

Defendant believes that the following nine cases are persuasive that the trial court properly directed a verdict in the case here under consideration.

#### (a) CASES DEALING WITH FARM MANAGEMENT.

(1) The case of *Ireland v. Mutual Life Ins. Co. of N. Y.,* 226 N.C. 349, 38 S.E. 2d 206, is very close in point. The facts established by the evidence are substantially identical, as far as they went, with those established by the evidence here. Like the case of *Leonard v. Pacific Mutual Life Ins. Co.,* case cited by plaintiff and discussed hereinbefore, it was decided by the Supreme Court of North Carolina.

The insured, who had been a farmer all of his life, and who so stated in his application for insurance from the Mutual Life Insurance Company of New York, and who was sixty years of age, sought and recovered a verdict and judgment for total and permanent disability benefits under his policy. He claimed to be totally and permanently disabled from arthritis which had its onset in 1937, but he didn't file suit for benefits until several years later.

The insured maintained that his knees and other joints were affected by arthritis, and that he suffered pain constantly, so as to be unable to plow, disc, gather crops, or to keep books and records, or to manage and supervise

his farms, consisting of 481 acres in cultivation and other acreage. He also maintained that he had difficulty in walking, and that when he took long automobile trips, he was driven by others.

The judgment rendered in his behalf was reversed on appeal for failure of the lower court to direct a verdict for the Mutual Life Insurance Company of New York. In so doing, the Appellate Court held that Mr. Ireland, as a matter of law, was not totally disabled, because his testimony and the testimony of his witnesses established that: He made purchases and sales of livestock and farm products; he was well educated, had an alert mind, and was a good executive; he and his wife executed notes and mortgages, and discharged the debts represented thereby; he paid out the money necessary to meet the expenses and purchases incidental to his farming operations, and demonstrated complete familiarity with the details thereof.

(2) *Cleveland v. Sun Life Assur. Co. of Canada,* 13 W.2d 318, 125 P.2d 251, supports the rule that an arthritic, who engages in agricultural activities and is able to pursue recreational activities, as a matter of law is not totally disabled.

(3) In *Light v. Connecticut Gen. Life Ins. Co.,* (D. Ct. W.D. La.), 35 F. Supp. 691, it was held that the insured was not totally disabled because, with the aid of his wife, he raised cotton.

**(b) CASES DEALING WITH EXECUTIVE ACTIVITIES.**

(1) In *Aronson v. Mutual Life Ins. Co. of New York,* 313 Ill. App. 35, 38 N.E. 2d 976 (being the same court which decided *Johnson v. Mutual Life Insurance Co.,* cited by plaintiff and discussed hereinbefore), a judgment in

favor of the insured was reversed on the ground that a verdict should have been directed for the Mutual Life Insurance Company of New York.

The insured had been afflicted for several years with chronic osteo-arthritis, accompanied with pain and some rigidity. The company had allowed him total and permanent disability benefits therefor over a period of five years.

The evidence showed that the insured was not illiterate, and that he possessed business and managerial experience, and that, as the part owner and operator of an apartment hotel, he collected rents, made bank deposits, drew checks, met tradesmen, and, generally, successfully and profitably managed the business.

(2) In *Metropolitan Life Ins. Co. v. Alston,* 248 Ala. 671, 29 So. 2d 233 (and plaintiff cites a case from Alabama), it was held that the insured, as a matter of law, was not totally disabled, although he was afflicted with coronary thrombosis and was suffering pain, because it appeared from the evidence that he continued to serve as chairman of the board of directors of a company, and to preside at board meetings and to perform advisory functions.

(3) In *Thigpen v. Jefferson Standard Life Ins. Co.,* 204 N.C. 551, 168 S.E. 845, it was also held that the insured was not disabled, as a matter of law, because, while his ailments prevented him from continuing to care for his farm, he did serve as a township tax lister, and as a member of the county school board, and as a county court crier.

**(c) CASES DEALING WITH BOTH FARM MANAGEMENT AND EXECUTIVE ACTIVITIES.**

(1) In *Cobb v. Mutual Life Ins. Co. of New York,* 151 Pa. S.654, 30 A.2d 611 (and plaintiff cites a case from this court), a judgment in favor of the insured was reversed on the ground that a verdict should have been directed for the Mutual Life Insurance Company of New York.

The insured had been afflicted with hypertrophic arthritis and other ailments, accompanied with pain. The company had allowed him total and permanent disability benefits therefor over a period of five years.

The evidence established that the insured continued to operate a farm, with a superintendent and additional help, and that he continued to serve as a director of a bank and to attend the board meetings although he was unable to perform manual labor, and although his doctors expressed the opinion that he was unable to follow any occupation, the court said:

> "* * * In fact, he has carried on his farm and the various activities connected therewith without interruption, and has attended the meetings of his bank board. It is not essential that he should do, or be able to do, everything necessary to be done in the conduct of this enterprise (citing authority). But his own testimony discloses that he did, and had the ability to, perform a substantial and essential part of the duties incident thereto, even though he could not do manual labor." (30 A. 2d 614.)

(2) In *New York Life Ins. Co. v. Howard,* 63 Ga. App. 865, 12 S.E. 2d 394, the court which decided several cases cited by plaintiff held that the insured, as a matter of law, was not totally disabled from a heart condition which

required him to desist from physical duties on his farm, and which, according to the medical testimony should require him to desist from all work, because the evidence established that he served as an executor of an estate, and as a member of his state's General Assembly, and that he managed his farm, and for the additional reason that the evidence did not show, either that his earnings were diminished or that he desisted from a substantial part of his total duties.

(3) *Azevedo v. Mutual Life Ins. Co. of New York,* 308 Mass. 216, 31 N.E. 2d 559, a judgment for the company was affirmed. The evidence showed that, by reason of impaired action in the insured's right arm, it was impossible for him to continue to milk his cows, plow his land, etc., but that he did, with the assistance of additional employees, buy and sell cows and farm produce, and manage the operations of his farm and dairy, and serve as a director of a milk distributing organization.

#### 4. The Theory of Common Care and Prudence Is Not Applicable Here.

By his contention that the law does not require an insured to work at peril of his health, or if performance entails pain and suffering which persons of ordinary fortitude would not be willing to endure (Br. 37, 38), plaintiff seeks to invoke the "common care and prudence" doctrine, recognized in some jurisdictions, and which had its origin in cases where the insured *did not work* and was held to be justified in *desisting from work* upon proof that if he worked he would jeopardize his life or his health.

Some courts refuse to recognize the theory. Others recognize it, but apply it only when it appears affirmatively that the insured abandoned work. Others recognize and apply it when it is shown that the insured attempts to work but is unsuccessful in performance. None apply it when the insured follows his own or some other remunerative occupation.

Plaintiff cites a number of cases in which the theory was recognized and applied, or at least considered in the determination of the issues. These cases may be grouped, as follows:

(1) Cases where it appears that the insured actually abandoned work: *Aetna Life Ins. Co. v. Davis, Millis v. Continental Life Ins. Co.; Fitzgerald v. Globe Indemnity Co.;* and *Massachusetts Bonding & Ins. Co. v. Worthy.*

(2) Cases where it appears that the insured attempted, but failed, to conduct his own occupation: *Massachusetts Bonding & Ins. Co. v. Worthy,* and *Aetna Life Ins. Co. v. Norman.*

(3) Cases where the insured was unable to walk or to attend to his own personal affairs, *Aetna Life Ins. Co. v. Norman,* and cases where the insured was able to attend to his own personal affairs, but was unable to attend to the affairs of his occupation, *Fitzgerald v. Globe Indemnity Co.*

(4) Cases where the insured was afflicted with pulmonary tuberculosis, which is a disease that, as a matter of common knowledge, is seriously aggravated by activity, such as, *Aetna Life Ins. Co. v. Davis,* and *Millis v. Continental Life Ins. Co.,* as well as *U. S. v. Lawson* and *U. S. v. Sligh* (Br. 54).

(5) Cases where the insured made unsuccessful efforts to perform odd jobs, such as *Aetna Life Ins. Co. v. Davis; Temples v. Prudential Life Ins. Co. of America; Wright v. Prudential Ins. Co. of America;* and *Millis v. Continental Life Ins. Co.,* as well as *Equitable Life Assur. Soc. v. Boyd* (Br. 46, 54).

Although the Supreme Court of Arizona has not expressly adopted the "common care and prudence" theory, it has, in *Equitable Life Assur. Soc. v. Boyd, supra,* quoted from a federal decision where the doctrine was applied. However, in the Arizona case, a judgment for an insured nightwatchman for total disability benefits was affirmed because he didn't work with reasonable regularity and his scattered efforts to hold down odd jobs were futile, and in the federal case mentioned, the insured had died from pulmonary tuberculosis, and the medical testimony was that his activities had substantially impaired his health and had actually tended to shorten his life.

It is true that Dr. J. H. Patterson expressed the opinion that Mr. Hughes was totally and permanently disabled (R. 95), and, as indicated by his remarks set forth on page 29 of appellant's brief, he based this opinion upon his belief that activity would "irritate the conditions present there and, naturally, would cause more pain," (R. 93, 99). It is likewise true that Dr. H. L. Goss stated that hypertrophic arthritis is a common condition in men past fifty years of age, many of whom continue to work (R. 79, 80), and that Dr. Patterson found plaintiff to be an active man, mentally alert, organically sound, and free from ailments other than arthritis (R. 100). Moreover, plaintiff testified, as follows:

"Q. Well, then, aside from the pain, you don't know of anything that is the matter with you, physically or mentally, do you?

A. No, I don't." (R. 196)

Cases holding that one who is engaged in his customary occupation, or in some other occupation or activities, is not, as a matter of law totally disabled, even though his work be accompanied with pain, include: *Ireland v. Mutual Life Ins. Co. of New York, ante; Cleveland v. Sun Life Assur. Co. of Canada, ante; New York Life Ins. Co. v. Howard, ante; Aronson v. Mutual Life Ins. Co. of New York, ante; Metropolitan Life Ins. Co. v. Alston, ante; Stewart v. Pioneer Pyramid Life Ins. Co.,* 177 S.C. 132, 180 S.E. 889, and *Lyle v. Reliance Ins. Co. of Pittsburgh, Pa.,* 197 Ark. 737, 124 S.W. 2d 958. Excepting the *Howard* and the *Alston* cases which deal with heart conditions, and the *Lyle* case which deals with rheumatism, the foregoing involve arthritis. (The *Lyle* case is from Arkansas, as are the cases of *John Hancock Mutual Insurance Co. v. Magers,* and *Mutual Life Ins. Co. v. Dowdle,* cited along with six other Arkansas decisions, by plaintiff, and discussed hereinbefore.)

Cases holding that the testimony of a physician to the effect that the insured is totally and permanently disabled is without probative value when the evidence shows that the insured is actually pursuing an occupation with reasonable regularity, include: *Cobb v. Mutual Life Ins. Co. of New York, ante; Thigpen v. Jefferson Standard Life Ins. Co., ante; Cleveland v. Sun Life Assur. Co. of Canada, ante; Deadrich v. United States,* 74 F.2d 619; and *United States v. Baker,* (C.C.A. 9), 73 F.2d 691.

The following remarks from the opinion of the Supreme Court of South Carolina (and plaintiff has cited the South Carolina case of *Caldwell v. Volunteer State Life Ins. Co.,* which is discussed hereinbefore), are apropos:

> "In the present case the plaintiff's own statement of his claim of total disability consists of assertions in general terms of his pains and sufferings; but he continues at his work. The only evidence upon which plaintiff could rely to take the case to the jury was the assertion of the doctor of his opinion that plaintiff is totally and permanently disabled. We have seen by the decisions of our own Supreme Court that such medical opinion evidence, in the light of the undisputed facts, has no probative value. There is authority from other jurisdictions and from the United States Supreme Court sustaining the position taken by our Supreme Court." (180 S.E. 893).

As stated by the Supreme Court of Arizona, in *Cope v. Southern Pac. Co.,* 66 Ariz. 197, 204, 185 P.2d 772, 777:

> "In *Steele v. Kansas City Southern Ry. Co.,* 265 Mo. 97, 175 S.W. 177, 181, it is said: '* * * We are not bound, even as an appellate court, to believe a mere witness in a case when it appears from conclusive physical facts or otherwise patently that such witness is either perjured or clearly mistaken. * * *' To this observation we wholeheartedly subscribe."

### 5. The Theory of Income from Capital Investments Is Not Applicable.

In his specification of error (Br. 12), and throughout his argument, and specifically under a separate heading (Br. 40 to 43), plaintiff urges that the increases in his land, livestock and income throughout the six-year period

for which he claims total disability benefits, amount to a return on his invested capital and do not constitute the fruits of his industry and activities. This is obviously his chief contention on this appeal.

Plaintiff cites *Anair v. Mutual Life Ins. Co. of New York,* which is a clear case of return on capital invested, in that the insured, by reason of nervous and mental afflictions, was unable to concentrate or to continue her law practice, and so abandoned her usual occupation and acquired a small apartment house which, with virtually no management, returned her some income.

Other clear cases of capital investment cited by plaintiff are *Mercantile Commerce Bank & Trust Co. v. Equitable Life Assur. Soc.,* and *Comfort v. Travelers Ins. Co.,* in each of which it appeared that the insured received salary as president of a corporation by way of distribution of earnings rather than by way of compensation. The same idea prevails in *Lorentz v. Aetna Ins. Co.,* where businesses were conducted by employees on salaries and commissions, and in *Bubany v. New York Life Ins. Co.,* where income was received from rental properties and investments.

*Boughton v. Mutual Life Ins. Co., Pacific Mutual Life Ins. Co. v. McCrary,* and *Hoover v. Mutual Trust Life Ins. Co.,* do deal with farm operations and the income derived therefrom, but in the *Boughton* and *McCrary* cases, the farms were operated through the media of tenant farmers, employees and relatives, and in the *Boughton* case, the cattle business was virtually abandoned and 350 acres of farm land were lost on tax sales, and in the *McCrary* case, the insured gave no personal attention to the farming operations. In the *Hoover* case, it appeared

that the insured merely gave directions to four employees, and the court said that such slight mental exertions did not amount to an occupation.

Although the court said in the *Anair* case that *"a test"* of total disability is whether the insured would be able to procure employment in the open labor market in the same capacity in which he is managing his investments (Br. 42), it did not say as plaintiff urges (Br. 40), that such would be *"the test"* of total disability. Such "a test" would not be applicable to a farm owner and operator who is capably handling his own profitable agricultural pursuits and other activities. If it were applicable, then there is no evidence upon which a jury could reach a conclusion that plaintiff could not obtain such employment, and it is axiomatic that a verdict cannot be predicated upon speculation, surmise or conjecture. On the other hand, there is uncontradicted competent evidence that plaintiff did manage the investments and affairs of others, and that he did so capably and efficiently.

Plaintiff concedes that the evidence shows that he has served on the school board, continuously, and on the Council of the Salt River Valley Water Users Association, continuously, and as the Administrator of an intestate's estate, and on behalf of a nonresident sister in the acquisition and operation of a farm (Br. 19 to 22; 30, 46), but he argues that each and all of these activities have been performed in a perfunctory manner.

With respect to his services on the school board, his own testimony shows that the school district operates two schools, that the school board passes upon leases, building projects, transportation, operating budgets, and determines all school and school district policies, and that

plaintiff is the president of the school board, and that he presides at the meetings, signs the minutes, and that he signs all checks for purchases and expenditures of the district (R. 112 to 122). According to his witnesses, Painter (a member of the school board), and Lynd (Rural Supervisor), the school building program and the district budgets and all matters pertaining to the district are taken up with plaintiff, and that plaintiff is capable of handling the school district affairs (R. 217, 228, 229). Indeed, he must be capable of doing so, for he majored in education in normal schools, and was trained to be a teacher (R. 111).

With respect to his services on the thirty-man law making Council of the Salt River Valley Water Users Association, his own testimony shows that he is the vice-chairman, and until recently was the chairman of the Council, that he attended and presided over regular and special meetings of the Council, and that he made the motor trips to the various dams in the Salt River Valley Water Users Project to inspect the same (R. 191 to 194, 197, 198). According to his witness Freestone, plaintiff has attended most of the Council meetings, and is a capable member of that body (R. 226, 227). The testimony of plaintiff also establishes that in the latter part of 1941, and the early part of 1942, he served on a special labor committee, and went to Washington, D. C., as an accredited representative of the Association to settle tax problems with the government (R. 194, 198 to 200).

The Salt River Valley Water Users Association is an organization of farmers, operating a water and electric system for the supply of irrigation water and power in

central Arizona. The lands served by the Association comprise approximately 250,000 acres. The Association operates five large storage dams, two diversion dams, eight hydroelectric plants, one steam plant, one diesel plant, 1400 miles of canals and laterals, hundreds of miles of power lines, two hundred deep well pumps, and other plants necessary for the operation of a water and electric utility. *Reynolds v. Salt River Valley Water Users Association,* (C.C.A. 9), 143 F.2d 863.

Passing to the evidence with respect to plaintiff's services as the administrator of a decedent's estate, it is to be noted that while he contends that his attorney did all the work, he admits that he duly qualified and served under court appointment, and that he submitted to the probate court a verified account of his services with a request for compensation in excess of the usual administrator's fees, for extraordinary services performed by him in the administration of the estate (R. 184 to 187).

A pretty fair indication of his capacities to manage the agricultural affairs for others is to be found in the fact that, not only does he lease 185 acres of his own land, and executes the leases and arranges for irrigation of such land (R. 124, 138 to 143), but he has handled a forty-acre farm for a nonresident sister, and, in so doing has advertised it for leasing and has arranged to have it cultivated, planted, and cared for, and for the grain raised thereon to be stored and sold (R. 143 to 145, 166, 167).

Plaintiff argues that he did all of the farm work and supervision before he contracted arthritis, and that since that time he has hired others to do it for him. He also argues that his steady income from the farm operations is traceable to increased prices for farm produce. These

arguments are pure assumptions, and are not borne out by his testimony.

Plaintiff concedes that his usual occupation has been that of farming and farm management, as stated in his application for the insurance policy (Br. 7, 31, 40; R. 110, 111), but his brief states:

> "Before becoming disabled, the insured gave these farms a most active and efficient management, but since that time he had become less active so that his management was much less efficient" (Br. 31).

Plaintiff concedes that he is better off financially than before he developed arthritis (Br. 20; R. 145, 207), and that:

> "The evidence also showed the farm, so being operated, to earn a substantial income" (Br. 34).

These circumstances do not indicate that the management was less efficient. Nor can the increase in income be explained as the result of increased prices, because farm costs had also increased, and plaintiff had acquired more acreage and more livestock.

As far as farm help is concerned, the record doesn't justify any conclusion that conditions have changed materially. Plaintiff's wife is afflicted with rheumatism (R. 152). He has at his farm foreman, and with whom he discusses crop changes (R. 133), the same man who has been working on the farm since before plaintiff developed arthritis, and he has always used help in his dairy operations, even before such have obtained their present magnitude (R. 109, 125; 128 to 131).

It is, no doubt, true, as he has testified, that he avails himself of "custom labor" to till the soil and to harvest

the crops, but, as his witness, Saylor, states, this is customary in farm operations in the Salt River Valley (R. 233, 234).

That plaintiff is the manager and supervisor of his farm operations is clear from the facts that he keeps the farm books and records, and himself makes all of the entries therein (R. 155 to 158), and that he borrows money, signs notes, mortgages and loan applications, and discharges such obligations (R. 138, 163, 164, 167; 181 to 183), and that he pays all of the bills as the same become due, pursuant to statements submitted to him (R. 204). The bills are paid by checks drawn by him (Br. 21), upon two separate bank accounts which he maintains, and wherein he makes all deposits (R. 152). As to his most active bank account, it is interesting to note that he testified, as follows:

> "Well, I think on the Valley Bank that at different times there was money deposited over there for me *that I didn't personally make myself.* * * *." (R. 159).

These aspects of his operations are close to those of the insured who was held, as a matter of law, not to have been totally disabled, in *Ireland v. Mutual Life Ins. Co., ante,* and which are set out in the opinion, as follows:

> "And in this connection, plaintiff, under cross-examination, testified: 'We operate these two farms, you might say, as a partnership, since we file a joint income tax'; that one bank account in his name was kept in the Bank of Mt. Olive; that all deposits were put into that account, and all expenditures were paid by check drawn on that account; and that, in his language, 'I wrote and signed the checks for the farm

and whenever the necessity arose I applied to the bank and borrowed money. My principal duties were to provide funds for the operation of the farm. I have already testified that I did the banking business, looked after the deposits and loans with the Bank of Mt. Olive'." (38 N.E. 2d 208).

Plaintiff's testimony discloses that he has operated his tractor on a few occasions, even as recently as the summer of 1948 (R. 135, 136), and that he has purchased seed, livestock and land (R. 133, 134, 161, 168, 170, 172, 173, 178, 189), and that he has borrowed grain (R. 168, 169), and that he has arranged for servicing and demonstrating his dairy equipment, and for trading old for new equipment (R. 135, 171, 178).

Plaintiff's testimony also reveals that he has done and is doing, continuously, the following things amongst others:

1. Pays taxes on the land (R. 160);
2. Sells the grain raised on the land (R. 148 to 151; 189);
3. Stores seed and grain for future use, and had 1,200 sacks of grain in storage at the time of trial (R. 145, 150);
4. Purchases farm supplies and equipment, and arranges for repairs of machinery (R. 164 to 167; 171; 175 to 181);
5. Hires and pays the farm hands (R. 125, 126, 130);
6. Arranges and pays for irrigating, cultivating and seeding the land. (R. 159, 166, 169, 170; 172 to 174; 176, 179, 188);

7. Arranges and pays for cutting hay, threshing grain, bailing hay, and hauling of grain and hay (R. 136, 137, 161, 162, 165, 166, 168, 170; 175 to 178; 180 to 183);
8. Sells milk to Borden's Creamery, and takes up dairy problems with the creamery. He looks over the monthly statements, accepts checks in the amounts of $800.00 to $1,000.00 per month, and deposits such proceeds (R. 145 to 148; 207).

Plaintiff has been able to drive his automobile and his pick-up truck on occasions, and to take day-long motor trips to northern Arizona and to California (R. 104, 131, 132, 191).

Plaintiff's farms, and his sister's farm, and his dairy, and the school board, and the Council of the Salt River Valley Water Users Association didn't run themselves. There is no evidence that others could take credit for such successful, profitable and continuous operation, nor that his own income and profits were derived from invested capital. All of these properties and activities were under his constant supervision, and the only reasonable inference which can be drawn from the evidence is that their success and profits were attributable to his own energies and capabilities while he was conducting, with reasonable continuity and for compensation, gain and profit, his own occupation and other occupations in which he might reasonably be expected to engage, within the test relied upon in his argument (Br. 12).

## CONCLUSION

No evidence nor medical opinion whatsoever was introduced, or even offered at the trial, to show or tending to show that plaintiff was totally and permanently disabled on February 1, 1942. If it be assumed that there was evidence that he was so disabled at the time of trial in October, 1948, such evidence would not tend to show such condition six years earlier, *Light v. Connecticut Gen. Life Ins. Co., ante.* This principle is peculiarly applicable, in view of plaintiff's contention that his arthritis has become progressively worse during the years for which he seeks to obtain total disability benefits.

Plaintiff's unexplained delay for many years before instituting suit, is a circumstance tending to show that he was not totally disabled as contemplated by the policy, *Hicks v. Mutual Life Ins. Co. of New York,* (C.C.A. 4), 83 F.2d 275, c.d. 299 U.S. 563, 57 SC. 25, 81 L.ed. 414, 305 U.S. 564, 59 SC. 54, 83 L.ed. 355; *Deadrich v. United States, ante.*

Plaintiff testified that he submitted to defendant as proof of total disability, everything that defendant asked for—nothing else—and did not disclose anything so submitted other than some x-rays which were taken several years earlier (R. 59, 60).

Therefore, plaintiff wholly failed to show that he is entitled *to demand* total disability benefits under the policy.

Furthermore, plaintiff wholly failed to show that he is entitled *to receive* total disability benefits under the policy, and the evidence clearly established that, as a matter of law, he is not so entitled.

Plaintiff proved that he is, and has been afflicted with arthritis accompanied with pain. He was not insured by this policy against either condition. He also testified that he is not so physically active as he used to be. He was not insured against such condition.

The undisputed evidence established that, during all of the time for which he seeks to recover total disability benefits, he has followed the very same occupations which he followed before he developed arthritis, and that these are the occupations for which he was trained and educated. It is impossible to conceive what more he could have done, considering his age and position in life, to conduct his usual occupation, or any other suitable occupation, with reasonable continuity and for compensation, gain and profit.

Both the Supreme Court of Arizona and the Ninth Circuit Court of Appeals pay large respect to the judgment of the trial judge, when, after observing the witnesses and noting all matters at the trial which are not capable of record, he concludes that there is no excuse for a verdict save for the defendant, and so rules by such a direction. *Cope v. Southern Pac. Co., ante;* and *Deadrich v. United States, ante.*

The evidence was such that a jury could not properly return a verdict for plaintiff. Had the jury been given the case and returned such a verdict, the same would have been founded wholly upon surmise and conjecture contrary to undisputed facts, and the trial court would have been bound to have set it aside. Therefore, it would have been an idle gesture to so submit the case. For these

reasons, it is respectfully submitted that the judgment for defendant should be affirmed.

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